86-636 (1)

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1986

MARTIN COUNTY and OKEECHOBEE COUNTY, Florida,

Petitioners,

vs.

ROBERT MAKEMSON, ROBERT LEE DENNIS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT A. GINSBURG
Dade County Attorney
ERIC K. GRESSMAN
Assistant County Attorney
Counsel of Record

Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151
Counsel for Petitioners

GOPP

QUESTION PRESENTED

Whether, in state criminal proceedings, the indigent defendants' Sixth Amendment right to effective assistance of counsel invalidates a state statute, imposing limits on the fees of court-appointed counsel, where

(a) counsel has provided effective assistance, and

(b) the statutory fee limit is "inflexibility imposed in cases involving unusual or extraordinary circumstances" or is "confiscatory of [counsel's] time, energy and talents."

LIST OF PARTIES

The parties to the proceedings before the Florida Supreme Court, Case No. 66,780, were the petitioner Martin County and respondent court-appointed attorneys, Robert Makemson and Robert G. Udell.

The parties to the other proceeding, Florida Supreme Court Case No. 66,829, were petitioner Okeechobee County and respondent court-appointed attorneys, Robert Lee Dennis, J. Blayne Jennings, John R. Cook, Michael D. Gelety, Richard D. Kibbey, and Robert G. Udell.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARTIN COUNTY and OKEECHOBEE COUNTY, Florida,

Petitioners,

vs.

ROBERT MAKEMSON, ROBERT LEE DENNIS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Pursuant to this Court's Rule 19.4, the petitioners, Martin County and Okeechobee County, Florida, file this single petition for writ of certiorari to review the judgments and opinions of the Supreme Court of Florida involving identical constitutional questions. Both judgments and opinions were entered in the respective proceedings on July 17, 1986.

OPINIONS BELOW

The Florida Supreme Court's opinions and judgments are attached to the Appendix and informally reported as *Makemson, et al. v. Martin County*, 11 Florida Law Weekly 337 (Fla. Supreme Court Case No. 66,780, July 17, 1986), and *Dennis, et al. v. Okeechobee County*, 11 Florida Law Weekly 350 (Fla. Supreme Court Case No. 66,829, July 17, 1986). *See*, Appendix, pp. App. 1, 36

The opinion of the Fourth District Court of Appeal in the Martin County case is reported as *Martin County v. Makemson*, 464 So.2d 1281 (Fla. 4th DCA 1985), and attached to the Appendix hereto. *See*, Appendix, p. App. 14. The opinion of the Fourth District Court of Appeal in the Okeechobee County case is reported as *Okeechobee County v. Jennings*, 473 So.2d 1314 (Fla. 4th DCA 1985), and attached to the Appendix hereto. *See*, Appendix, p. App. 38

The trial court order in the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida, has not been officially reported but is attached to the Appendix hereto. *See*, Appendix, p. App. 30. The trial court's original and amended orders of the Circuit Court of the Nineteenth Judicial Circuit in and for Okeechobee County, Florida, have not been officially reported but are attached to the Appendix hereto. *See*, Appendix, pp. App. 51, 57

JURISDICTION

On July 17, 1986, the Supreme Court of Florida entered two opinions invalidating Section 925.036 (1981),

Florida Statutes. This petition was filed within ninety (90) days of said opinions.

The jurisdiction of this Court to review the decrees of the Florida Supreme Court is invoked under 28 U.S.C. §1257(3). A discussion of the raising and the deciding of the federal questions is contained in the section entitled "Raising The Federal Question", *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Florida Statutes, Section 925.036 (1981) reads:

> 925.036 Appointed counsel; compensation—
>
> (1) An attorney appointed pursuant to s. [section] 925.035 or s. [section] 27.53 shall, at the conclusion of the representation, be compensated at an hourly rate fixed by the

chief judge or senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit; however, such compensation shall not exceed the maximum fee limits established by this section. In addition, such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the court. If the attorney is representing a defendant charged with more than one offense in the same case, the attorney shall be compensated at the rate provided for the most serious offense for which he represented the defendant. This section does not allow stacking of the fee limits established by this section.

(2) The compensation for representation shall not exceed the following:

(a) For misdemeanors and juveniles represented at the trial level: $1,000.

(b) For noncapital, nonlife felonies represented at the trial level: $2,500.

(c) For life felonies represented at the trial level $3,000.

(d) For capital cases represented at the trial level: $3,500.

(e) For representation on appeal: $2,000.

STATEMENT OF THE CASE

A. Statutory scheme

Florida Statutes Chapters 27 and 925 (1981) governed the appointment of all respondents below. Chapter 27 of the Florida Statutes creates a public defender system in which an office of the public defender is created in each judicial circuit of Florida. Such public defenders are state employees limited in salary by the State of Florida.

In cases where defendants have conflicts with the public defender's office, Florida Statutes Section 27.53 provides two options. Section 27.53(3)(b) empowers the trial court to appoint a public defender from another circuit. Section 27.53(3)(a) permits the court to appoint a private attorney from a list of attorneys who register their availability "for acceptance of special assignments without salary to represent indigent defendants." Fla. Stat. Section 27.53(2).

Florida Statutes Section 27.53(3) provides that, if the court appoints a private attorney, he shall be paid pursuant to Florida Statutes Section 925.036. Section 925.036 provides for maximum fees for a court-appointed private attorney according to most severe offense charged.

B. The Makemson case

In *Makemson*, the trial court chose to appoint a private attorney, Robert Makemson as a special public defender to represent the Defendant, J.B. Parker. J.B. Parker was charged with murder in the first degree, armed robbery and kidnapping. Attorney Makemson

was appointed on May 16, 1982 and represented the defendant through sentencing on January 11, 1983. Three prosecutors, with the assistance of investigators, tried the case. The trial involved one hundred witnesses and fifty depositions. After a change of venue, respondent Makemson spent 64 hours in court in Lake County, Florida, one hundred and fifty miles from his home. Respondent Makemson sought compensation for 248.3 hours, which experts valued at a minimum of $25,000.00.

On April 20, 1983, the trial court held hearings on respondent Makemson's Petition for Attorney's Fees. After hearing testimony of two experts that this was an exceptional case, the trial judge on May 4, 1983 found Section 925.036, Florida Statutes (1981), unconstitutional and awarded attorney Makemson $9,500.00, which was $6,000.00 over the legislative cap. The trial court's order found that "Robert Makemson did an excellent job as trial counsel for Defendant." Appendix, p. App. 31. In that order, the trial judge also appointed Robert G. Udell, respondent, as attorney for defendant on appeal and set Mr. Udell's fee at $4,500, which is $2,500 over the statutory cap. Appendix, p. App. 32.

C. The Dennis case

In *Dennis*, V.L. Underhill and eleven others were charged with violating several provisions of the Florida Statutes relating to conspiracy, drug trafficking and arson.

Underhill and several other defendants were certified as indigent and counsel, respondent attorneys, were appointed to represent them pursuant to Florida

Statutes Chapter 27. Before the conclusion of the representation, the Court held a hearing on February 25, 1983 to assess whether or not court-appointed counsel should receive fees exceeding $2,500.00 each, the maximum limit for representation in non-capital, non-life felony cases.

The trial court noted the case involved a list of 130 state witnesses and four thousand pages of state evidence. The court also found that trafficking controlled substance and conspiracy to traffick controlled substance cases involve some of the most complex criminal defense work. The court estimated a privately retained attorney would charge a fee between $30,000 and $40,000. Finding that it would be "extremely unlikely that any competent lawyer would accept representing a defendant in this case . . . for a fee of twenty five hundred dollars or less", the trial judge ruled that court-appointed counsel should be allowed a maximum of $10,000.00 each for representation of each defendant.[1] *See*, Appendix, pp. App. 51-59.

D. Appellate rulings in *Makemson* and *Dennis*

Petitioners, Martin and Okeechobee Counties, sought relief in the Fourth District Court of Appeal of Florida. On March 6, 1985, the Fourth District quashed both trial courts' orders because of long-standing Florida precedent holding the fees to be mandatory. *See*, Appendix, pp. App. 14, 38. Because the Fourth District felt the statutory maximums unfair in some cases, it certified four questions to the Florida Supreme Court as follows:

---

[1]Said fee would be reduced by $5,000.00 in cases of multiple representation.

I. [Is the statute] unconstitutional on its face as an interference with the inherent authority of the court to enter such orders as are necessary to carry out its constitutional authority?

II. If the answer to the first question is negative, could the statute be held unconstitutional as applied to exceptional circumstances or does the trial court have the inherent authority, in the alternative, to award a greater fee for trial and appeal than the statutory maximum in the extraordinary case?

III. If the answer to the second question is affirmative, should the trial court have awarded an attorney's fee above the statutory maximum for proceedings at the trial level, given the facts presented to it by trial counsel by his petition and testimony?

IV. If the answer to the second question is affirmative, should the trial court have awarded an attorney's fee above the statutory maximum for proceedings at the appellate level before the services were rendered and with the facts known to it at the time of the award?

In answering the first question, the Supreme Court of Florida on July 17, 1986 issued two opinions holding the Florida Legislature's limit on court-appointed attorney's fees constitutional on its face. However, responding to the second certified question, the Florida Supreme Court found the statutory fee limits unconstitutional under the Sixth Amendment as applied

to extraordinary or unusual circumstances. The Florida Supreme Court answered the last two certified questions in the affirmative and thus upheld the trial courts' finding that respondents should be paid in excess of statutory maximums. *See*, Appendix, pp. App. 1, 36.

RAISING THE FEDERAL QUESTION

In both cases below, the Florida Supreme Court answered identical certified questions from the Fourth District Court of Appeal: is Fla. Stat. 925.036 "unconstitutional on its face" or "unconstitutional as applied to exceptional circumstances." These certified questions did not specify whether they related to the federal or state constitution, nor did they specify any particular constitutional provision upon which they were based.

In both cases, briefs submitted by the parties and amici made express reference to the Sixth Amendment. For example, respondent Dennis's brief before the Florida Supreme Court at page 8 states: "[n]or . . . can there be any doubt under *Gideon v. Wainwright* and *Argersinger v. Hamlin* that the trial courts have an *absolute* 'jurisdictional' duty to provide counsel for the indigent criminal defendants of the state of Florida in order to comply with the Sixth and Fourteenth Amendments to the Constitution of the United States itself." The amicus brief of Metropolitan Dade County in *Makemson*, on page 13, maintains that the Florida Supreme Court "has stated the *only* conceivable ground for declaring Section 925.036 unconstitutional is on the basis of the sixth amendment . . ."

In finding that Fla. Stat. 925.036 "unconstitutional as applied to exceptional circumstances," the Florida Supreme Court expressly held "that the statutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circumstances, interfere with the defendant's sixth amendment right 'to have the assistance of counsel for his defence.'" *See*, Appendix, p. App. 6, *infra*. No other federal provision was cited in support of that holding. Nor did the Florida court refer to or rely upon any provision in the Florida constitution in reaching that conclusion.[2]

Therefore, there can be no question that the decisions of the Florida Supreme Court rested entirely upon the Sixth Amendment to the United States Constitution and that federal constitutional questions were raised and decided in the proceedings below.

---

[2]The Florida Supreme Court further stated that Section 925.036 as interpreted so as to interfere with the Sixth Amendment right to counsel, "impermissibly encroaches upon a sensitive area of judicial concern, and therefore violates article V, section 1, and article II, section 3 of the Florida Constitution." *See*, Appendix, p. App. 6, *infra*. Those provisions of the Florida Constitution merely establish the three branches of the state government and create the state courts. But such provisions are obviously not the basis of holding the statute invalid under the Sixth Amendment. The court refers to these state constitutional provisions merely to show one of the consequences of applying the statute in contravention of the Sixth Amendment.

REASONS FOR GRANTING THE WRIT

I

THE DECISIONS RAISE NOVEL AND CONFUSING FEDERAL CONSTITUTIONAL QUESTIONS.

In ruling the Florida counsel fee limitation impermissibly intrudes upon the Sixth Amendment rights of indigent defendants, the Florida Supreme Court has created a questionable and confusing precedent of historic importance.

Never before has there been such an admixture of conceptual oranges and apples. By what constitutional token can it be said that a criminal defendant's Sixth Amendment right to effective representation is dependent upon counsel's ability to obtain a substantial or non-confiscatory fee for effective services rendered? Does that mean that all lawyers skilled in criminal defense work are constitutionally protected in refusing to supply Sixth Amendment needs of indigent defendants whenever the fee awards are deemed inadequate, either by counsel or the trial judge? What has happened to counsel's professional obligation respecting *pro bono* representation?

If, as the Florida court states (*see*, Appendix, p. App. 13), a statutory fee limit may be so inadequate in a given case as to be "confiscatory as to his or her time, energy and talents," the Fifth Amendment's "taking clause" is implicated. Do we therefore establish a Fifth Amendment right of court-appointed attorneys to receive what a trial judge considers to be adequate,

non-confiscatory compensation? Would such a right spring from the Fifth Amendment or the Sixth Amendment or both?

If, as the court below holds (*see*, Appendix, p. App. 13), the determination of this confiscatory factor is to be left to the discretion and inherent power of trial judges, still more problems arise. What are the guidelines for exercising this discretion in administering this unique constitutional right of counsel? The only answer supplied by the court below is to tell the trial judges to use their best judgment and inherent power only in "cases involving extaordinary circumstances and unusual representation." Appendix, p. App. 1. Such a flexible guideline not only lacks precision but also leaves the matter entirely to the trial judge's discretion. The court does not indicate that the trial judge is to give any weight to the financial ability of the county or other governmental unit responsible for underwriting the costs of supplying court-appointed counsel.

Finally, does the decision mean that the states and counties are subject to federal constitutional control as to the amount they must pay to court-appointed counsel for indigents? This may well implicate serious problems of Federalism. Have state legislatures lost all power to set maximum fees for court-appointed counsel? Does the decision below mandate that the federal constitutional obligation to pay non-confiscatory compensation for court-appointed counsel is to be borne by counties rather than states, as is the situation in Florida and many other states?

II

THE DECISIONS BELOW CONFLICT WITH THIS COURT'S GUIDING PRINCIPLES AND APPLICATIONS OF THE SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL.

The Florida Supreme Court ignored the seminal rulings of this Court in *Powell v. Alabama*, 287 U.S. 45 (1932), *United States v. Cronic*, 466 U.S. 648 (1984), *Ross v. Moffitt*, 417 U.S. 600 (1974), *Ake v. Oklahoma*, 470 U.S. ____, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and *Morris v. Slappy*, 461 U.S. 1 (1983).

Powell v. Alabama, *supra*, found that attorneys as officers of the court are "bound to render service when required by" such an appointment. Attorneys' obligatory service in cases where counsel is constitutionally required is sufficient to ensure effective assistance of counsel without the need to override fee limits imposed by a state legislature. The New Jersey Supreme Court, noting that although the United States Supreme Court in *Powell* did not specifically state that attorneys are obligated to provide constitutionally required counsel without compensation, found that "the context makes it clear that uncompensated service was in mind [in *Powell*]." *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966). The New Jersey Supreme Court found that "*Powell* did assume that, if attorneys as officers of the Court were called to serve without pay, no constitutional restraint stood in the way." *Rush*, *supra*, 46 N.J., at 408; 217 A.2d, at 446.

Despite the clear implication of *Powell*, the Florida Supreme Court without analyzing federal precedent found that the right to effective assistance of counsel was violated by a strict application in extraordinary or unusual cases of the legislative limit on court-appointed attorney's fees. The Florida Supreme Court clearly sought to relieve accused indigents of the external "restraint" upon their counsel's fee. In so interpreting the Sixth Amendment guarantees to prohibit such restraints on court-appointed fees, the Florida Supreme Court ignored the dictates of *United States v. Cronic*, *supra*. *Cronic* found that a presumption of prejudice was not justified when counsel is subject to external restraints on his performance, such as granting an attorney only 25 days to prepare for trial. Indeed, a restriction on a fee awarded at the conclusion of the case is even more external than a twenty-five day limit on preparation. Such a fee is only awarded at the end of the proceedings and has nothing to do with the ability of counsel to advocate, prepare or obtain experts or witnesses. Nothing connected with a criminal case is more external than the fee awarded after the case is concluded. The attorney is ethically precluded from limiting his time and resources to a case simply because of the prospect of a small fee.

The Florida Supreme Court sought under the guise of the constitutional right to effective assistance of counsel to rectify the disparity in fees between indigent and wealthy clients. However, such infusion of public policy cannot be derived from the Sixth or Fourteenth Amendments. *Ross v. Moffitt*, *supra*, held that the fact that a particular service might benefit indigent defendants does not mean such a service is constitutionally required. The *Ross* Court found the state had no "duty to duplicate the legal arsenal that may be privately retained by a

criminal defendant . . . but only to assure the indigent defendant an adequate opportunity to present his claims fairly. . ." *Ross, supra*, at 616. *See also, Britt v. North Carolina*, 404 U.S. 226 (1971) (upholding state court's refusal to grant defendant a transcript of the first mistried case).

In *Ake v. Oklahoma, supra*, this Court noted that the state need not purchase all assitance wealthier counterparts might buy. In limiting the state's obligation under the due process clause to provide assistance of one competent psychiatrist, *Ake* found the state could provide that psychiatrist as it saw fit. Defendant's constitutional rights did not extend to choosing a psychiatrist of his personal liking or receiving funds to hire his own psychiatrist. *Gideon v. Wainwright*, 372 U.S. 335 (1963), and its progeny, contrary to the misguided expansion by the Florida Supreme Court, requires only appointment of competent counsel. The state of Florida has provided pursuant to Florida Statutes, Chapters 27 and 925, a mechanism for appointing competent counsel in all cases. The Sixth and Fourteenth Amendments do not require any particular mechanisms for such appointments, even in extraordinary cases.

In effect, the Florida Supreme Court by raising the fee for court-appointed attorneys in extraordinary or unusual cases found that the Sixth Amendment guarantees not only competent representation, which undoubtedly occurred in the cases at bar, but also a meaningful attorney-client relationship. The Florida Supreme Court's reasoning directly conflicts with *Morris v. Slappy, supra*. *Slappy* held that the Sixth Amendment guarantees only competent representation, not a meaningful attorney-client relationship.

The genesis of the Florida Supreme Court's unauthorized expansion of *Gideon* is its failure to analyze the factors which determine if a state restriction is violative of Sixth Amendment guarantees. The Florida Supreme Court found, without a record of any incompetent assistance of counsel, that restricting a fee in extraordinary criminal cases is *per se* unconstitutional. In so doing, the Florida Supreme Court ignored *Cronic* which provides the correct analytical framework for determining *per se* Sixth Amendment violations. A presumption of such a violation, *Cronic* held, was justified only where the circumstances are so likely to prejudice accused that the restriction amounts to a breakdown in the adversary process. There is no record of any breakdown in the adversary process from imposition of fee limits in extraordinary cases. In the cases at bar, no attorney was thwarted in his efforts to advocate effectively. *Makemson* and *Dennis* thus run afoul of *Cronic* in creating a presumption without a finding or a record of a breakdown in the adversary process.

III

STATE AND FEDERAL COURTS ARE SHARPLY DIVIDED ON THE CONSTITUTIONALITY OF STATUTORY FEE LIMITS ON COURT-APPOINTED COUNSEL FOR INDIGENT DEFENDANTS.

A conflicting array of state and federal decisions have led to Balkanization of the law on the constitutionality of court-appointed fee limits. Annotations and articles emphasize the diversity in

the interpretation of the constitutionality of statutes limiting court-appointed attorney's fees.[3]

Federal cases and twenty states have found that court-appointed counsel has no right to fees in absence of statutory authority. *See*, cases cited in 21 A.L.R 3d, at 822-23. Courts in five other states, including Florida, have found for various reasons that court-appointed attorneys are entitled to compensation without express provision for payment in a statute or court rule. *See*, cases cited in 21 A.L.R. 3d, at 830.

Directly in conflict are the interpretations of the instant cases and the highest court of New Jersey. In *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966), the Supreme Court of New Jersey rejected the argument that a court-appointed attorney's right to compensation arose because an attorney, if unpaid, could not perform in a manner to satisfy the constitutional guarantee of effective assistance of counsel.

In an intricate analysis of the Sixth Amendment, the *Rush* court found no Sixth Amendment violation springing from the failure to pay court-appointed counsel. *Rush*, 46 N.J., at 405-07; 217 A.2d, at 444-45. The New Jersey Supreme Court knew "of no data to support a claim that an assigned attorney fails or shirks in the least the full measure of an attorney's obligation

---

[3] *Annotation-Validity and Construction of State Statute or Court Rule Fixing Maximum Fees for Attorney Appointed to Represent Indigent,"* 3 A.L.R. 4th 576; *Right of Attorney Appointed by Court for Indigent Accused To, and Court's Power to Award, Compensation by Public, in Absence of Statute or Court Rule*, 21 A.L.R. 3d 819; Hunter, *Slave Labor in the Courts—A Suggested Solution*, 74 Case & Comment 3 (July-August 1969).

to a client. . . . [a] lawyer need no motivation beyond his sense of duty and his pride." *Rush, supra*, 46 N.J., at 405-06; 217 A.2d, at 444.

In Alabama, the denial of a motion for funds for payment of counsel is not a denial of due process where defendant had competent counsel, availability of experts and subpoenas. *Harris v. State*, 367 So.2d 524 (Ala. Cr, App. 1978), *writ denied, Ex parte Harris*, 367 So.2d 534. *See also, People v. Atkinson*, 50 Ill. App. 3d 860, 8 Ill. Dec. 932, 366 N.E.2d 94 (1977) (held that reduced fee award was not so unfair that it violated defendant's Sixth Amendment rights and questioned whether competent court-appointed counsel had standing to raise a Sixth Amendment question).

In *Atkinson*, the Illinois court found the Sixth Amendment claim unpersuasive unless counsel were totally uncompensated or unless the bar was required to assume the entire burden of indigent defense with no provision for a public defender system. Florida, with an extensive public defender office in each circuit and provision for paying court-appointed counsel, hardly fits even *Atkinson's* expanded view of a Sixth Amendment violation. *State v. Woomer*, 277 S.E.2d 696 (S.C. 1981), held that the limit in a death penalty statute on expenditures for skilled services for an indigent defendant did not violate due process or equal protection.

Federal courts and the majority of states hold that, in absence of statutory authority, a court-appointed attorney is not entitled to fees and that failure to provide for fees does not violate any constitutional provision. *See, Dolan v. United States*, 351 F.2d 671 (5th Cir. 1965); *United States v. Dillon*, 346 F.2d 633 (9th Cir.

Cir. 1965); *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965); *Miller v. Pleasure*, 296 F.2d 283 (2d Cir. 1961), *cert. denied*, 370 U.S. 964; *Annotation—Right of Attorney Appointed by Court for Indigent Accused to, and Court's Power to Award, Compensation By Public In Absence of Statute or Court Rule*, 21 A.L.R. 3d 819, 822-24.

In *United States v. Perry*, 471 F.2d 1069, 153 U.S. App. D.C. 101 (D.C. Cir. 1972), the Circuit Court held that services rendered by court-appointed counsel for an indigent defendant prior to the effective date of the Criminal Justice Act of 1966 are non-compensable. *Botts v. United States*, 413 F.2d 41 (9th Cir. 1969), held that other than as provided by the Criminal Justice Act, an attorney appointed for an indigent criminal defendant by a federal court is not entitled to compensation from the United States. *Accord, Dolan, supra.* The federal district courts have strictly interpreted the limits on court-appointed fees imposed by the Criminal Justice Act. *United States v. Hunter*, 385 F.Supp. 358 (D.C. D.C. 1974) (any guidelines for excess compensation for court-appointed attorneys must be consistent with the Criminal Justice Act and legislative will); *United States v. Harper*, 311 F.Supp. 1072 (D.C. D.C. 1970) (Criminal Justice Act is not designed to provide full compensation to counsel); *United States v. Aadal*, 282 F.Supp. 664 (D.C. S.D. N.Y. 1968) (compensation under Criminal Justice Act of 1964 allows payment of only one of two court-appointed counsel for defendant).

Federal courts, unlike the Supreme Court of Florida herein, rejected the contention that at a certain point an attorney's uncompensated services to an indigent is a constitutional "taking" or confiscatory. *Dillon, supra*, at 638, noting that it spoke for the vast majority of

courts passing on the question of the right to fees outside statutory authority, held:

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."

Under *Dillon*, and a majority of jurisdictions, no attorney can claim his service to poor criminal defendants is confiscatory under the federal constitution. Yet, the Florida Supreme Court held that if an attorney's services are confiscatory, then the trial court, to ensure effective assistance of counsel, may at the conclusion of the case award fees exceeding statutory maximums. The Florida Supreme Court's conclusion is in conflict with *Dillon* and *Williamson v. Varedman*, 674 F.2d 1211 (8th Cir. 1982), holding an attorney can be constitutionally compelled to represent an indigent.

A few state courts conclude for various reasons that statutory fee maximums can be exceeded in extraordinary circumstances. Without passing directly on the Sixth Amendment, *People v. Randolph*, 35 Ill.2d 24, 219 N.E.2d 337 (1966), held statutory fee limits on court-appointed attorneys unconstitutional as applied to the particular factual circumstances. *Randolph* concluded the fee limits intruded upon the trial court's

inherent power. Some other state court decisions, while failing to base their reasoning on the Sixth Amendment, are also in accord with the instant decisions. *Smith v. State*, 118 N.H. 764, 394 A.2d 834, (1978) (holding fee limits were an unconstitutional intrusion upon separation of powers); *Bias v. State*, 568 P.2d 1269 (Okla. 1977) (finding an attorney should be reimbursed for extraordinary expenses).

The majority of states, however, reject any claim that statutory fee limits violate constitutional guarantees. In *Keene v. Jackson County*, 3 Or. App. 551, 474 P.2d 777 (Or. App. 1970), *pet. denied*, 257 Or. 335, 478 P.2d 393, *cert. denied*, 402 U.S. 995, the court rejected the constitutional argument that the state and county could not demand an attorney's services to represent indigents without paying just compensation. The Arkansas Supreme Court found that statutory fee limits on court-appointed attorneys in criminal cases were not takings under the due process clause, even though the maximum fee was inadequate compensation. *State v. Ruiz*, 602 S.E. 3d.625 (Ark. 1980). *Sanders v. State*, 276 Ark. 342, 635 S.W.2d 222 (1982), found reduction of a reasonable $4,625 attorney fee to the statutory maximum in a criminal case proper. *Accord, State v. Conley*, 603 S.W.2d 415 (Ark. 1980) (reversing trial court's award above statutory fee limit for court-appointed counsel).

The instant cases are thus in conflict with the majority view of state courts as well as rulings in federal jurisdictions. This confusing array of decisions and constitutional rationale is ripe for resultion by this Court.

IV

THE RESOLUTION OF THE ISSUES IN THESE CASES IS OF GREAT IMPORTANCE TO STATE AND LOCAL GOVERNMENTS.

This Court should grant certiorari to resolve the conflicting interpretations of the Fifth, Sixth and Fourteenth Amendments as they apply to statutes and rules limiting fees for court-appointed attorneys for indigent defendants. The burden upon the states of providing court-appointed attorneys should not vary according to a particular state's interpretation of the Fifth or Sixth Amendments of the United States Constitution. Such important constitutional questions have far-reaching effects on state and county budgets.

During fiscal year 1986, Dade County, Florida, spent $4,452,000 just on fees for private attorneys appointed under Chapters 27 and 925. The smaller Martin County spent $63,508.39 on attorney's fees and costs in all criminal cases except those involving capital offenses. From June 1982 to June 1986, $41,202.00 was spent in Martin County on court-appointed attorney's fees and costs in capital cases. In Okeechobee County, $42,000 was projected for 1986-87 for attorney's fees and costs for indigent defense.

Of course, all such projections must be revised substantially upward. Already, another trial judge has ordered Okeechobee County to pay $10,000.00 for court-appointed attorney's representation in one case. Requests for fees in Dade County have exceeded $30,000.00 and, in several cases, judges have awarded

fees in excess of the statutory cap in less than three months after *Dennis* and *Makemson*.

Following *Dennis* and *Makemson*, trial judges in Florida may increasingly award fees exceeding the statutory cap, because of the increasing length and complexity of criminal defense work. The increasing drug use and sale in Florida could very easily make "extraordinary" or "unusual" cases commonplace. In one year in Dade County, fees paid court-appointed private attorneys increased by $654,347.00. The resolution of the constitutionality of Florida Statutes, Section 925.036 (1981), is of critical importance to the limited treasuries of states and counties. In Florida alone the resolution of this question is of great importance especially to small localities, such as Okeechobee County and Martin County. Statutory fee limits are not designed to protect counties in ordinary cases. Rather, it is the extraordinary case that has the potential of severely limiting or even eliminating vital County revenues.

This Court should not sanction the draining of state and local budgets according to the misguided and questionable interpretation of the United States Constitution by the Florida Supreme Court. Millions of dollars are expended in the states for indigent defense. If the Sixth Amendment prohibits state legislatures from limiting to some degree the drain on the treasury from court-appointed attorney's fees, state and county revenues will be at the whim of trial judges with the limited view of the cases before them. The states' legislatures and county boards can no longer accurately project how much to budget for various county services. Such a tremendous loss of vital government revenue

should not be summarily disposed of by an assertion, without support, that the Sixth Amendment commands fees in excess of any limit.

The Florida Supreme Court's decisions in *Makemson* and *Dennis* were in some ways unique in that they extended the Sixth Amendment to include a right to have one's counsel have the prospect of an unlimited fee. Such a contention was rejected by the New Jersey Supreme Court in *Rush, supra*. It is crucial that this Court resolve any ambiguity in its decisions as to the distribution between the bar and citizens of the state or localities of the burden of providing adequate counsel to indigent defendants. The debates within bar associations illustrate that the notion that an attorney is obligated to provide services *pro bono* is not completely accepted. The law should be uniform as to whether the United States Constitution commands that attorneys be paid in excess of statutory limit for services rendered an indigent.

CONCLUSION

For the foregoing reasons, the petitioners request the writ of certiorari be granted.

Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney

ERIC K. GRESSMAN
Assistant County Attorney
Counsel of Record

Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151
Counsel for Petitioners